UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
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AMERICAN CIVIL LIBERTIES UNION,

Plaintiff,

v. 17 CV 3391(PAE)

DEPARTMENT OF DEFENSE, et al.,

Defendants.

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New York, N.Y.
December 19, 2017
3:00 p.m.

Before:

HON. PAUL A. ENGELMAYER,

District Judge

APPEARANCES

ACLU
Attorneys for Plaintiff
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DEPARTMENT OF DEFENSE
Attorneys for Defendants
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(Case called; in open court)

THE COURT: We're here for oral argument now on the cross-motions that have been made. I have thought about it and it seems to me it probably makes as much sense as anything for the ACLU to go first on these motions. It could have been done either way, but I think that makes at least the most sense.

I will hear from the ACLU first.

MR. KAUFMAN: Thank you, your Honor.

Here is what we know: The government acknowledges that in January 2017 it successfully conducted an intelligence gathering raid against AQAP, a terrorist group in Yemen. In an effort to defend the raid after public criticism surrounding the resulting deaths of a Navy SEAL and multiple Yemeni civilians, the President's press secretary emphasized that the raid was approved after an extensive planning process. To illustrate that process, the press secretary pointed to a White House meeting between the President and a small group of top national security officials, specifically including the director of the CIA, at which the raid was approved, and then the President boasted about the raids intelligence bounty in his very first speech to Congress.

The CIA bears the burden of demonstrating that its Glomar response to plaintiff's FOIA request is both logical and plausible; but given these facts, the agency simply cannot do so because the only thing that responding to the request would

reveal, the agency's intelligence interest in the raid is already known. Moreover, under these circumstances that is exactly what the drafters of the FOIA would have expected. One of the main purposes of the FOIA was to end the government's practice of selective disclosure especially concerning national security matters. The CIA's Glomar response in this case is simply an effort to engage in that practice and respectively this Court should reject it.

Your Honor, I would like to just try to address some of the things that came up in the government's reply brief from last week. I will go through it and note where I think a comment is required. So first I want to clarify the Glomar standard that is at issue here because there is some back and forth about the Court needs to decide. I think the parties agree that the question here is whether responding to the request would cause harm under Exemption 103, and demonstrating that is the agency's burden here. In order to carry that burden, the CIA's justification of those harms must be logical or plausible.

THE COURT: Logical or plausible is what comes from the D.C. Circuit decision that deals with Glomar, but there is a suggestion from the back side from the defense brief that the Wilson standard is different.

Can you harmonize the Wilson standard, which talks about the disclosure being appropriate only if it is -- I think

you know the sound bite from page 187 of Wilson. I will not read the whole thing aloud.

MR. KAUFMAN: Yes, your Honor. This is a point that is worth clarification. So the standard on any FOIA response is logical or plausible. I think the D.C. Circuit in *Drones FOIA* the court explains that a case like this, which we think is very close to the *Drones FOIA* case, involves an intersection of these two kinds of cases. So in regular FOIA cases, including Glomar cases, the ultimate question is whether the government's response is logical or plausible.

The Wilson standard, which comes from the D.C. Circuit, and so the D.C. Circuit has addressed that same standard through what in the D.C. Circuit is the Wolf standard, asks how we determine whether a piece of information has been officially acknowledged by the government. A case like this involves both of those tests, both of those strands. So when we talk about the government's ultimate burden in this case, I think the government would agree that its burden is to demonstrate that its response is logical and plausible.

THE COURT: Look, Wilson says -- and we're dealing here with whether there has always been an official disclosure -- that classified information is deemed to be officially disclosed only if it is "as specific as the information previously released" matches the information previously disclosed. It is another dimension of that, but

we'll skip that.

The issue that is presented then is how specific the information that would result if you are to prevail at this step would then be? Because, yes, there has been some form of disclosure through the press secretary, but it has been of necessity at an extremely abstracted high level. So maybe the answer is you clear the step but then ultimately wind up getting a very abstracted level response at the next step.

I welcome your explaining to me how you square your bid here, which seems to be calling for a disclosure point by point as to the five different dimensions of your FOIA request with Wilson which says official disclosure works only at a specific level.

MR. KAUFMAN: That is a good question, your Honor. So the stage that we're at now we're talking about just responding, period. We're not talking about the details of that response. We're not talking about whether any document will actually ever be disclosed to the plaintiffs. We're not even talking about a Vaughn Index at this point. What we're talking about is whether the government's claim that something that has not been acknowledged will be revealed if it merely says, Yes, we have a record. That is the stage that we're at.

Just to back up a little bit, in the end as we explained in our opening brief, there are several ways to combat a Glomar response. The first is simply if the agency

doesn't do its job to explain why the answer is logical or plausible. We cite a bunch of cases where that has happened -- *Phillippi* is one -- where the Court just simply rejections the explanation on its face without the introduction of any kind of contrary evidence or official acknowledgment. The other side is when information has been disclosed by the government in an official capacity and that information is the same as the information upon which the agency is basing its Glomar response, and we think that is the situation we're in right now.

THE COURT: Explain that. I am not sure I follow what you just said.

MR. KAUFMAN: Sure. In the end so justify a Glomar response, the government has to point to some protected fact that would be revealed if it says it has records because that is the minimal step that we're asking for with this motion.

THE COURT: You want to clear this and fight another day as to how generic or specific the Vaughn Index need be?

MR. KAUFMAN: Absolutely, your Honor.

THE COURT: But you understand that if you take literally the Wilson standard, it has significant implications for any Vaughn Index; right? The point is if you get past the Glomar response because the CIA's response in the Vaughn Index need not be specific, you wind up in the situation where the Vaughn Index could be essentially utilizing the latitude that

Judge Garland cites in the D.C. District case at a very generic extracted level at which it might be unrevealing to you.

MR. KAUFMAN: This is true. There is no way to contest that, your Honor. In the *Drones FOIA* itself after winning the D.C. Circuit argument and that opinion, we actually didn't receive any documents.

THE COURT: How generic versus specific was the Vaughn Index that you got?

MR. KAUFMAN: Well, we didn't get a Vaughn Index in that case.

THE COURT: What happened in that case in the subsequent history?

MR. KAUFMAN: On remand the government described categories of records that it had and described why it should be withheld. We challenged those and ultimately lost in a non-published opinion.

THE COURT: How generic, if you will, were the categories that the government put in its Vaughn Index substitute in effect?

MR. KAUFMAN: What I recall from that the case is that the government said, We have a set of legal memos, and said very little more than that. It explained why it believed that those documents would merit withholding under the FOIA.

THE COURT: Even that would arguably be more specific than has previously been disclosed here. In other words, sure,

at a very high level I understand your argument why there has been an intelligence interest expressed in the sense that at the front end Director Pompeo was in the room. To quote Hamilton, He is there at the time of the decision that is taken and in the back there is intelligence material that is received. Although, it is not specifically said that it goes to the CIA. Perhaps in contrast to another agency.

There is nothing here that is disclosed that says that, for example, the CIA rendered any legal judgment as to the raid or that its legal operative had anything to do with this or for that matter the CIA possesses the fruits of another agency's legal analysis. So even at the abstract level at the highly generalized level at which the agency responded in this D.C. Circuit case, even that may be more specific than had been specifically disclosed here. In other words, when you chronicle what Judge Garland looks at in that decision, he keeps writing, And there is more and there is more and there is more. That discussion in our case is only a few sentences.

MR. KAUFMAN: It is true that in this case what we have put forward so far we're not claiming has acknowledged anything beyond the intelligence interests that we think defeats the agency's Glomar response.

The questions that you are discussing, your Honor, are things for a later motion. It will be up to the government to decide how it wants to categorize responsive records after it

conducts a search, which it has not done yet.

THE COURT: The question is what you are trying to accomplish so. If in effect you are making a doctrinal point that this battle ought to be fought out not at the Glomar stage but at the Vaughn Index or its functional equivilent stage, I get the point. If what you are trying to do is get actual useable information from a FOIA request, the challenge presented I think by the Wilson standard is you may get information at such an abstracted level that it is negligible utility.

MR. KAUFMAN: Sure. A couple responses, your Honor. First, we think there is a clear public interest in the CIA following the law. And if it cannot justify as logical and plausible a Glomar response in this case, it should be rejected. On a practical level, though -- this is evident in the *Drones FOIA* case as well -- the agency issuing Glomar responses that it cannot substantiate after a motion, really just delays the entire process by months or possibly even years.

THE COURT: I take it you, as a repeat FOIA player, have an institutional interest even if this FOIA request bears no useful fruit at the end of the day in maintaining sense of legal discipline about the parameters of Glomar?

MR. KAUFMAN: Absolutely, your Honor. We as the ACLU but also the public as well because the standards that come out

of cases like this govern how the agencies will treat future FOIA requests.

THE COURT: Let me ask you there is something unusual in the CIA's response in that they did undertake some degree of document review. They represent that they took certain steps to confirm the existence of records that would speak to the presence of the CIA director at the January 25th working dinner at which the raid was said to have been approved, and the government says that that document review yielded nothing.

MR. KAUFMAN: Yes.

THE COURT: How do you process that? Where does that fit into the analysis?

MR. KAUFMAN: It is hard to figure out what the CIA was trying to do there.

THE COURT: What is your take on its relevance?

MR. KAUFMAN: I think that it has very little impact on this case. We argued in the brief that it sort of undermines what the CIA is trying to accomplish. Now, the CIA claims what it searched for wouldn't be responsive to the request. That is a head-scratcher for us given that part of our request addresses the approval process for the raid. So when the government said that it searched one office in the CIA -- nothing more than that -- for documents over an arbitrarily short time period -- this was not the last six months up in until the time of the request. I think it was

over than less than a month that they chose and didn't explain why. They searched limited documents -- calendar entries of the director and other sorts of what they call briefing materials over a very short period of time.

THE COURT: Your view is that there are other parts of the CIA that would have had to be searched to determine comprehensively whether the CIA had any records referencing the January 25th dinner?

MR. KAUFMAN: Absolutely. I think under the case law there is no question that when we asked the CIA for records, a reasonable search would not be limited to one office.

THE COURT: So help me with this. Supposing we're past Glomar and the CIA whatever the Vaughn Index would say is obliged to search for records relating to the January 25th dinner, where would they go in your view beyond where there declarations say they went?

MR. KAUFMAN: Well, I am not exactly sure of the different compartments of the CIA where that would be true. It says the agency must take reasonable steps to search for records where they would reasonably be expected to be located. So the general counsel's office. I don't know if there are suboffices that deal with certain countries or certain kinds of operations, but certainly not just the office of the director himself. They would need to search for those materials not just from January 15 to February 15th or about what they did in

this case, but they would need to search for them all the way up until the time they began searching. So the last nine or 10 months of eight or so months of material.

So to turn your question about the specificity involved down the line, we have had some back and forth about what Wilson requires and I think the Courts have tried to implement what the Second Circuit did. I don't think it is relevant to this case here. I think that very clearly we can say that the acknowledgments we put forward are as specific as the intelligence interests that we're claiming has been revealed here.

THE COURT: Because it is put at a general level, you could wind up getting a response that simply says we are unable, see Glomar in effect, to describe by character even the nature of responsive materials. It suffices to say all of them fit within Exemption One or Exemption Three, and to describe them with anymore texture would then be intention with Wilson.

MR. KAUFMAN: That is possible, your Honor, but I think it is a little premature to decide that. The agency we think should have to justify its responses to our requests, perhaps prong by prong.

THE COURT: What do you mean prong by prong?

MR. KAUFMAN: Our request has five discrete categories.

THE COURT: That's exactly the problem. That is

exactly what I am trying to pin you down on. In other words, let's look at your five categories.

MR. KAUFMAN: Sure.

THE COURT: The first, and one we can go through the exercise as to each of these, the legal and policy bases in domestic foreign and international law upon which the government evaluated or justified the raid, including but not limited to records related to the designation of parts of Yemen as "areas of active hostility" and the legal and factual basis that the government uses in designating such areas. That is the first of your five prongs.

MR. KAUFMAN: Sure.

THE COURT: You are not arguing, are you, that Sean Spicer when he spoke about the raid said anything about number one, are you?

MR. KAUFMAN: No, we're not.

THE COURT: Here is the problem: If you are later going to direct or ask me to direct that the government in its Vaughn Index or some functional equivalent thereof break out its response by number one, versus two, versus three, versus four, versus five, if the government gives a yes answer, yes, we have records even if we claim that there are all exempt, under number one they are admitting something that has not been admitted by the official disclosure that you are basing your opposite to Glomar on.

My point being is if you are insisting that what follows at the next stage be broken out by one through five, you are walking into a Wilson problem.

MR. KAUFMAN: Well, I am not sure that is right, your Honor. I think this is a critical incident in *Drones FOIA*. In *Drones FOIA* the D.C. Circuit said that an ordinary FOIA response by the CIA would not reveal whether the agency itself, as opposed to some other U.S. entity, such as the DoD, operates drones. What it was doing there was understanding that the request did not seek information about the CIA. It did not seek information that necessarily concerned the CIA. But it did seek information in the CIA's possession. What the D.C. Circuit said is even if the CIA does not operate drones and fly them around and use the lethal weapons attached to them, it is implausible that the CIA can stand here before us and say that it does not have an intelligence interest in drones.

THE COURT: I am assuming for the time being that we get past your generic point that the CIA has an intelligence interest on the basis on the material you have rendered. The issue is what comes next, and I thought earlier you were acknowledging that there is enough flexibility here that the CIA's response would not be required to hue to the five separate subparts that you have identified for precisely the policy reason implicit in Wilson. Now you seem to be taking a firmer line and saying, in fact, you would expect that the

CIA's Vaughn Index or other response would track your five categories in your request.

MR. KAUFMAN: I think what I am saying is I am not sure what the agency will do. In past cases where the government lost the Glomar case either in the district court or in the circuit and then on remand, the agency just abandoned its response. Florida is the most recent in this example.

THE COURT: What do you mean abandoned its response?

MR. KAUFMAN: For example, there are several Glomar cases where a court will say, We don't buy this yet. We're not going to grant summary judgment to the agency. Remand and the court can determine how to move forward. Rather than then try to put forward a better justification or defend those responses in a different way, the agency will just abandon them.

THE COURT: Abandon them? I am not sure what you are saying. What you are saying is that the agency acceded to a court's ruling that there was not a valid Glomar court ruling they have to abide by it or appeal. The issue is at the next step when they respond, will you be taking the position that their response needs to be sorted by the five document calls or requests that you made, or as you seem to indicate earlier and as the drones strikes case seems to indicate and as the subsequent history seems to embody, can the CIA answer in a more generic way that doesn't provide a clear yes or no category by category as to whether they have documents.

MR. KAUFMAN: Just to be clear, I am not dictating how the CIA should respond. I am merely arguing that it will be the government's burden to defend whatever that response is.

THE COURT: You are not arguing that if you prevail at this stage, the CIA will necessarily be bound to construct its response in a way that discloses requests by request yes or no whether there are responsive materials.

MR. KAUFMAN: I think that is one option and I think it has happened in a variety of other cases where the agency sort of break down which part of the response they are actually going to give a Glomar to.

THE COURT: Forgive me. I understand that in some cases, it works that way. The issue is not whether that is one possibility. The issue is whether you're taking the position that here the agency will be obliged to do that.

MR. KAUFMAN: I would expect it that it could do that, but as we say in our briefs we think it is premature to determine what the agency's response will be.

THE COURT: You would acknowledge that in other cases intelligence agencies, national security agencies have been permitted as in drones strikes to respond in a much more abstracted level.

MR. KAUFMAN: Absolutely. Just to make this more concrete, your Honor, as an example, and I don't think we need to argue about these examples now, but we do think there are

records that would be responsive that would have nothing to do with this the CIA or at least what the government tries to argue in this case that its operational interests -- sorry operational role would be revealed.

For example, I think it is quite sensible to expect that in the wake of this raid whether or not the CIA had boots on the ground or provided live intelligence support or anything of that nature, that the CIA might have a memorandum summarizing the results of the raid. The CIA might have memoranda discussing individuals killed during DoD's raid and that would say nothing about whether the CIA was actually involved.

THE COURT: What would be fact if the CIA held documents that had been prepared by a sister agency? Say the beforehand legal analysis or the afterwards casualty analysis or anything in between, what would that say about the CIA that they possessed those records?

MR. KAUFMAN: This is addressed in the briefs, your Honor. I think the CIA sort of misled the Court a little bit in terms of how its regulation works in those circumstances. We point this out in our reply brief. The CIA has two options when it happens records that have other agency information. If the records themselves are the agency's, let's say DoJ gave a legal analysis to the CIA legal counsel, the CIA doesn't have to produce those records as its own under FOIA. It can refer

those records to DoJ and say, We have these in our possession but DoJ is going to take care of those.

THE COURT: There is a way in which the fact that the CIA happened to be the possessor goes undisclosed as long as a sister agency whose records they are then responds?

MR. KAUFMAN: Correct.

THE COURT: To the extent that the CIA, which is the only one of the government defendants that has made a Glomar response, hypothetically could possess records of another agency. If the CIA laterals those records to the DoD or DoJ, what does the CIA's response then look like as it relates to the records of another agency that it is tasking the other agency with responding about?

MR. KAUFMAN: For those kinds of records, it would refer the records per its regulation to the other agencies, and it may or may not disclose that fact in its declaration responding to the request. The other category of records covered by the CIA's regulation are records that have other agency information. I think this is the category in which my example falls into. CIA discussion of the DoD's raid and evaluation of the intelligence fruits or what have you, this would be a CIA record and the CIA would -- it would be responsive to our request. The CIA could refer that record to another agency so that agency can protect its own equities, but then the CIA would be forced to defend the withholding of that

information going forward.

THE COURT: Other than derivative of the other agency's point of view?

MR. KAUFMAN: Yes. Because what the structure of that kind of example is that it is a CIA record but there is FBI or DoJ or DoD information in it so those agencies might have an equity in it, but the CIA would have to respond. So when we talk about going through the prongs --

THE COURT: Why is it the case that that wouldn't then reveal something that is unrevealed as yet by the Spicer disclosure. Spicer says one thing about the CIA plus CIA which is that Pompeo was at the table at the time the decision was made. There is nothing said about whether he said anything. There is nothing said about whether he was primarily there for other agenda items. We know he was present. There is nothing said about whether the intelligence fruits of the raid that are later admitted by the President but also by spicer in a subsequent press conference went to the CIA at all.

So the CIA's admission as you would have it in its later stage FOIA response would be giving up the fact that the CIA came to possess these intelligence fruits. That is a new fact the; right?

MR. KAUFMAN: It may be, your Honor. I think a lot of this is why we think a lot of this is premature. Now, from what he put forward on this motion, we have been targeting the

CIA's intelligence interest, which we think has been clearly acknowledged. Now, when the CIA comes back and says--

THE COURT: Couldn't the intelligence interest be of that of a different intelligence agency? The CIA's interest is as reflected in Pompeo's presence. The government's intelligence interest is perhaps admitted by the later press conference but nothing then is said about the CIA specifically.

MR. KAUFMAN: That is true, but in *Drones FOIA* and also in the *Smith* case, you have acknowledgments that have nothing to do with the CIA. In *Drones* you have statements from the President about the U.S. Drone program. You had a statement from John Brennan, who at that point was only working in the White House and was not a CIA representative, also speaking about the U.S. drone program, and what Judge Garland said is that these acknowledgments, those first two, are sufficient to acknowledge the CIA's intelligence interests.

THE COURT: Is the *Drones FOIA* case the one that breaks things out agency by agency, or is it addressed to the agency as a collectivity for the purpose of that decision?

MR. KAUFMAN: That opinion is about the CIA, your Honor.

THE COURT: In contrast to the others. In other words, was the CIA the only agency in that case that filed a Glomar response?

MR. KAUFMAN: Yes.

THE COURT: The others as here did not?

MR. KAUFMAN: Correct.

THE COURT: I will give you an opportunity to respond, but I want to make sure that I have enough time with the back table. I think it is more fruitful at this point for me to turn to them.

Government, before I begin hear what you have come to stay so I understand the state of play with respect to the other three defendants per the order issued November 17, I understand that I will be receiving the DoD FOIA's response in final form by January 31st and the others beforehand.

MS. TINIO: Yes, your Honor. DoD's response is the only one still pending. Everyone else has completed their responses.

THE COURT: Where do we stand then as to a Vaughn Index as to the other three?

MS. TINIO: Those are not yet due, your Honor. Those usually are prepared later on in the process. So those would actually be submitted as typical with summary judgment briefing. There is a whole process laid out in the Court's November 17th order which, for example, directs the defendants generally to provide general descriptions, not Vaughn, and withheld records so that we may confer with the plaintiffs, which is the next deadline to identify disputed issues. That hopefully would narrow the scope of the issues to be limited

and at that point then the agencies would undertake to provide Vaughns.

THE COURT: So before we begin with the CIA specifically, can you explain why it is that three of the agencies are at least proceeding that far whereas the CIA and the CIA alone is going the Glomar route?

MS. TINIO: Absolutely, your Honor. I recall that that was a question that your Honor raised the last time we were together and we endeavored to address that in numerous ways in our papers and submissions. So first the fact that a military operation occurred in a specific place Al-Ghayil, Yemen, on a particular date on, I think January 29, 2017, that is a publically acknowledged fact. We know that because CENTCOM which is part of the DoD, your Honor, has issued press releases acknowledging that a military operation occurred. So the DoD is not saying that to acknowledge the existence or nonexistence of records would itself be a classified fact. That is the effort of the Glomar, and DoD is not saying that here.

THE COURT: What about DoJ?

MS. TINIO: DoJ likewise is not saying -- DoJ really refers to the OLC and I think one other --

THE COURT: Right.

MS. TINIO: They likewise, as well as the Department of State, are not saying that to acknowledge the existence or

nonexistence of responsive records here with respect to the raid that would not be classified as to DoJ and the Department of State. We've explained that as well.

THE COURT: The reason, though, why DoJ is district from the CIA is what?

MS. TINIO: The CIA, as we set forth in our papers, your Honor, has a very particular unique mission that the DoJ, Office of Legal Counsel, for example, and the Department of State, Office of Legal Advisor, they do not have. That mission is to conduct clandestine covert foreign operations and counterintelligence activities and things of that nature. It can encompass a variety of different things, but the people of the Office of Legal Counsel at DoJ are not engaging in clandestine covert foreign operations, counterintelligence activities and things like that.

So that is why the CIA has unique equities and because of its unique mission that is why, not just in this case but in other cases as well, the CIA often does find itself in a position of having to assert a *Glomar* where other agencies do not. In our papers we identify a number of cases. Some we specifically identified in our papers, but there are numerous ones where courts examine the CIA's Glomar on its own merits or on their own merits and do not tie them to --

THE COURT: Well, I am not saying you are estopped in some sense or all the four different defendants need to track

together; but I am trying to understand in as much of all them were described as essentially being at the table on that day, why it is that the CIA and the CIA alone is pursuing a Glomar argument, i.e., they are saying that our intelligence interests has been yet unrevealed.

MS. TINIO: At table on that date may clarify --

THE COURT: That they are identified by the White House press secretary as having been participated or been present for the President's review of the decision of whether to undertake the raid.

MS. TINIO: Absolutely.

THE COURT: And all of the defendant agencies are in effect listed as at the table or present for that discussion. Only one of them is disclaiming intelligence interests.

MS. TINIO: Your Honor, I would make a couple of responses. Preliminary I would note, for example, that the statement that then press secretary Spicer made about that dinner meeting that happened, he noted a number of people who were there -- Mr. Brennan, Mr. Kushner, the Price President, the President, Chairman of the Joint Chiefs of Staff General Dunford, General Mattis, General Flynn, Director Pompeo. It actually was not the case that all four defendants were there.

THE COURT: How does that help you? That suggests that the admission is more specific as to the CIA as being present at the creation than, say, the OLC?

MS. TINIO: I am simply saying there is no reason to tie them altogether and to link up how they rise and fall in this particular case.

THE COURT: Is the basis for the CIA's position that this is just what the CIA does, that because the CIA wants to not concede an inch because of its clandestine intelligence mission, even where there has been public acknowledgment that its leader was with the President when a mission was authorized, that it still is going to say *Glomar*?

MS. TINIO: Well, that is established by our declaration and the more important point about that meeting, your Honor, is that --

THE COURT: I am sorry. I am not sure you meant to give that answer.

My question is: Is the reason the CIA is making a Glomar response here because it is just what the CIA does? It has a muscle memory of always saying Glomar even when the White House press secretary to the world has said, CIA Director Pompeo was there when this was decided?

Help me with that.

MS. TINIO: Yes, your Honor.

THE COURT: It feels like what you are saying is that the CIA culturally and unusually more protective of its interest as covered by Glomar than some of the other defendants here.

MS. TINIO: Your Honor, thank you for inviting me to clarify. I misheard a different part of your question.

The CIA does not have some sort of automatically or knee-jerk fashion protected culture to say that we have a unique mission, not a more protected culture than a unique mission in the unique equities. I think going to one of your Honor's questions before where you had said the CIA was at the table, we would actually disagree with that characterization. The CIA was not at table as described.

THE COURT: Sorry. In a sense of Langley wasn't at the table, right, but the director of the CIA was at the table.

MS. TINIO: Sure. The director's presence as established by the CIA's submissions and declarations, Director Pompeo has different hats and has different roles.

THE COURT: Does he have some job title other than head of the CIA?

MS. TINIO: No, but is he, for example, part of a National Security Council. He is part of other things simply than representing the CIA's operation involvement.

THE COURT: Forgive me. In the various ex officio roles he has, they are ex officio because the officio refers to him as the CIA. It is not as if he is also working for OLC or something. The only reason he is at any of the relevant meetings is because of the job title he has at the CIA.

MS. TINIO: Yes.

THE COURT: What does it mean to say the CIA wasn't at the table? Who else from the CIA could more embody the CIA than Director Pompeo?

MS. TINIO: Your Honor, as we have established in our submissions, Director Pompeo as an advisor to the President, among many other advisors, could be present at a meeting, which is all then Press Secretary Spicer said. He was at a meeting where this was discussed.

THE COURT: I am sorry. You are asking me to assume that Pompeo was there not because he is head of the CIA but because he is a generally wise person in this area or something like that. I am not buying that.

MS. TINIO: Not exactly, your Honor.

THE COURT: He is there. It's not as if so some coherent alternative theory of what he is doing there has been articulated. He has the knowledge he has and the expertise he has and the relevance he has as director of the CIA.

MS. TINIO: Well, not exactly, your Honor. Not in terms of what you are saying; but, yes, he was there because he as the title of CIA director.

But going to the requests as your Honor started to run down, what our submissions establish is that Director Pompeo's presence at a meeting where this raid was discussed, as Press Secretary Spicer says, does not go further than that and revealed much more particular and protected facts that the CIA

itself has or does not have records or responsive to these requests. These requests are about the Al-Ghayil raid in Yemen.

THE COURT: Now we are getting to a separate issue. We are now to an issue, which we will get to in a few minutes, which is if you lose at this stage, how specific or general does your next level response have to be. To put it bluntly if Pompeo is CIA director as opposed to private citizen at the meeting at which the raid is discussed thoroughly at length as I think both the President and Spicer say and if the raid later yields what Spicer anyway says it was always intended to yield, which is a trove of intelligence information, how can it credibly be said that the CIA at least at a generic level doesn't have an intelligence interest in this?

MS. TINIO: Well, I think we're talking about a couple of different standards. At this point it might be helpful to be clear about what the standards are to go through them kind of one my one if your Honor --

THE COURT: I am sorry. Before we move to standards, articulate for me how it isn't logical and plausible that the CIA has an intelligence interest in a mission that the CIA director whose initiation of the CIA director was present for along with the President of the United States?

MS. TINIO: Within your question, your Honor, you embodied two different issues that have two different

standards. The Spicer statement about the meeting where he said the Pompeo was present, that goes to whether or not CIA has waived its ability to assert a Glomar. That goes to the Wilson test, which your Honor has previously asked my adversary about. The standard there is not: Oh, Pompeo was at that meeting. Is it credible that the CIA doesn't have any documents?

That is not the standard for the Wilson test. The Wilson test, as your Honor laid out, has three parts -- the disclosure, the acknowledgment has to be as specific as the facts seeking to be protected. It has to match and it has to have been officially and publically disclosed. Now, when your Honor goes to the logical or plausible or as you said credible standard, that goes to the first part of what we're trying to establish here.

THE COURT: Wait. This is what Judge Garland writes as to this very standard, "There does not need to be a specific public acknowledgment that there are actually documentary records on the subject. The Court can logically infer from a disclosed intelligence interests that there are records discussing".

So, please, this is the last chance to explain to me why there is not a disclosed intelligence interest. I know you want to go to standards. I am trying to pin you down on what to my mind is an important issue.

Yes or no is there a disclosed interest by the CIA in the raid?

MS. TINIO: Certainly not, your Honor.

THE COURT: Certainly not. Why not?

MS. TINIO: Director Pompeo presence at a meeting is not an official acknowledgment that the CIA had an intelligence interest in this particular military operation that occurred in a particular place on a particular day.

THE COURT: Suppose the same statement had been made by the public information officer at the CIA, would your answer be different?

MS. TINIO: I don't think so, your Honor, no.

THE COURT: Why?

MS. TINIO: Because the content would be the same and the content does not disclose that the CIA itself had intelligence interest in this raid.

THE COURT: So what else is he doing at the meeting?

MS. TINIO: That is not --

THE COURT: Is he not discussing Obama Care. He is not discussing taxes. He is discussing an intelligence gathering operation along as it that happens with other national security and other agencies and the other people.

MS. TINIO: What we have to do, your Honor, is we have look at Press Secretary Spicer's statement and what it tells us and what it does not. All it says about Director Pompeo is

that he was there. Now, if you look at Press Secretary Spicer's statement again, it is much longer than that. It says, Back in November CENTCOM proposed a plan for this raid to DoD. DoD approved it and then they went and talked to the President and then in January 25th there was a -- sorry, your Honor. I am referring to Exhibit 5 in the first declaration which gives the Spicer statement. It's page 11 of 13 of Exhibit 5.

THE COURT: I understand. At Tab 6, though, we have the President meeting with the Vice President, Secretary Mattis and others, including the then National Security Advisor and "CIA Director Pompeo" -- he is identified by his name -- where the operation was laid out in great extent.

No, it is certainly true the words used by any participant, including the President, aren't quoted but I would like to think that the CIA director has other things to do with his time on a Saturday night than to talk about at great length intelligence gathering operation that his agency is not interested in.

I am trying to figure out from a common sense prospective exactly the prospective that Judge Garland asks us to take. Why is it not a matter of common sense that this is not something the agency has an interest in?

MS. TINIO: Because there so much discussion between the parties about that *Drones FOIA* opinion by Judge Garland and

why don't we take a look at that. So Judge Garland does write that opinion, but I think we have to look at the context in which he was writing it. Not only --

THE COURT: Can we stop talking about, though -- just explain to me in human terms. You you keep going to the standard and I keep trying to give you a final chance to explain rather than state why it is that there is no disclosed intelligence interest by the CIA.

I will ask a series of pointed questions you tell me if this is what you are saying. Is what you are saying that he may have been at the meeting for other reasons and this subject was simply something he was sitting through? Is it what you are saying that even if he was there opining, he may have been opining in some capacity other than CIA head? Is it that even if he opined and even if he weighed in as CIA head that doesn't mean the CIA was interested or cared about this? Explain to me not just the conclusion, which is quite unpersuasive, but the reasoning.

MS. TINIO: Sure. Frankly, it could be any of those things, your Honor. All we can really do is look at what is disclosed by Press Secretary Spicer's statement, which is that he was there. So he could have been there to discuss other agenda items. So spicer's statement says that DoD CENTCOM presented this. It doesn't say CIA Pompeo presented this plan. It doesn't say that CIA Director Pompeo voted on the plan. It

just said he was there.

So he could have just been there because it was an agenda of other items. He could have been there because he was providing general advice. What this does not acknowledge is anything relating to the CIA as the CIA's possession of records responsive to this request, which is what Wilson requires.

THE COURT: You don't doubt, do you, that an agent of the President of the United States, his press secretary, would be capable of binding the CIA as to his interests? That is to say, let's suppose that Spicer said something that satisfied even your heightened rigorous standard of what would count, let's suppose the statement was, The CIA director was there because he had a disclosed intelligence interest, and let's just say he said literally those words, you are not arguing to me that Sean Spicer as the spokesperson for the President of the United States is incapable of binding the CIA to that point, are you?

MS. TINIO: Is what?

THE COURT: Incapable of binding the CIA to that?

MS. TINIO: We would not make the argument that Press Secretary Spicer's statements are disqualified, no.

THE COURT: Well, you are not saying that he cannot bind the CIA, are you?

MS. TINIO: I wouldn't put it that way. No, we're not saying that.

THE COURT: I am aware of a different case for which, for example, a statement made by the FBI was disclaimed as binding the CIA because they are essentially sister agencies but the FBI isn't the boss of the CIA. In point of contrast, the President of the United States does from a long chart sit atop the CIA and it is for that reason whether you are arguing or not that the President's spokesperson can't effectively speak for the CIA.

MS. TINIO: We're not saying that.

THE COURT: You are simply saying the words that were used are insufficient to disclose an intelligence interest?

MS. TINIO: Yes. An intelligence interest and also whether or not the CIA had a role. Both things are important. Whether or not the CIA had a role, an actual role or an intelligence interest in this particular military operation, both of those facts are properly classified and protected by statute and are not at all acknowledged by Press Secretary Spicer's statement.

THE COURT: Press Secretary Spicer's statement a few sentences earlier talks about a deputy's meeting, which I understand to be the deputies of the various national security or foreign affair agencies. He doesn't unpack who those deputies were and whether therefore the deputy for the CIA, for example, was there.

Anything you can share on that?

MS. TINIO: I am sorry?

THE COURT: Anything you can share on what was meant by the "deputies' meeting." There is a term of art quality about that.

MS. TINIO: Your Honor, for the purposes of this argument, we only can go by what the Press Secretary said. I don't have anything to add to that.

THE COURT: And the ACLU has not argued that the expressed deputies' meeting either necessarily means the deputy head of the CIA?

MS. TINIO: No, your Honor.

THE COURT: Now if you want to compare and contrast with the ACLU versus CIA, the Judge Garland decision, you can.

MS. TINIO: Sure. I think Mr. Kaufman said something about *Drones FOIA* where he said in *Drones FOIA* there weren't any CIA acknowledgments or statements at all. That is just simply dead wrong. First of all, in *Drones CIA* before Judge Garland even wrote his opinion, the CIA admitted, conceded, your Honor, that it had intelligence interests in the targeted killings using drones. In fact, it said, and you should really remand this, because we admit that we have an intelligence interest. There was a parallel litigation happening in the Second Circuit where the CIA admitted that it had responsive documents to FOIA requests about targeted killings.

So Judge Garland was writing in an environment in

which the CIA actually admitted it wanted the case to be remanded and said, We have an intelligence interest in these drones. Apart from that there were numerous statements not only by non-CIA individuals but there were numerous specific statements by CIA directors saying, Yeah, and there is an emphatic head nod for example when he was asked, Do the drones--

THE COURT: Look, if what you are saying is factually the record is denser in that case of the intelligence interests, I think we can all agree with that. Judge Garland begins about four or five paragraphs in a row saying in substance, And there is more.

MS. TINIO: Exactly.

THE COURT: I understand that the text here is thinner, but the Judge Gardephe isn't saying that is not a close case. It is not clear to me that the correct observation that the factual record here is thinner means that it falls sort of the required line.

MS. TINIO: Well, with respect to Judge Garland, we would review some of his language as not dispositive of the standards laid out. We would point the Court in addition to the D.C. Circuit's next opinion examining the same requests on the fact examining the zone strike requests issued in 2016.

In that D.C. Circuit opinion in the same case with respect to the same requests, at that point the CIA was no

longer asserting Glomar because of its admissions and in that case and in the parallel Second Circuit case. In that case the D.C. Circuit properly went through the standards, first looking at the CIA's indication of exemptions and whether or not that was logical and plausible because that is the context in which the logical or plausible standard applies. Is it logical or plausible to say you are looking at Exemption One? Yes. And then after that when the D.C. Circuit found that the CIA had met its burden to show that it is logical or plausible then the D.C. Circuit said, Well, now the ACLU has is saying there has been an official acknowledgment, and it applied three-part Wilson test and that is the proper kind of procedure the way you march through the different parts of the analysis and that is really accurately reflected by the D.C. Circuit's subsequent opinion in 2016 in the very same case.

THE COURT: The Second Circuit has told us that it is not rigidly required that the matching part of the Wilson test be applied. So while I appreciate the tenor of Wilson is suggests a degree of rigor, the *New York Times* case suggests that the circuit does not oblige a reviewing judge to rigorously apply the matching component, i.e., that one has to look at each document called and ask the question whether that has been disclosed.

You are not arguing with that, are you?

MS. TINIO: Well, we think that Wilson is still the

law and we certainly appreciate the court's and *New York Times* I think thoughts about the second prong of that; but the *New York Times* court in that case still applied all three prongs and numerous courts in the Second Circuit have applied all three prongs of the Wilson test after that opinion, including twice in the *Targeted Killings* case where Second Circuit affirmed.

THE COURT: But the circuit also says that the matching aspect of the Wilson test does not require absolute identity and then it goes on to say, "Indeed such a requirement would make little sense. The FOIA requester would have little need for undisclosed information if hadn't had precisely information previously disclosed."

Given that isn't the real issue here not the existence of the intelligence interests as closed but the latitude you would have at the next step to tailor your responses to make sure that you are not disclosing more than that which has been disclosed in the course of your, say, Vaughn Index?

MS. TINIO: I think that is getting a little bit ahead of things. The three elements even with the Court's thoughts about prong two still apply to anything the ACLU has identified as an official acknowledgment. What they are focusing on most is Press Secretary Spicer's statement about Director Pompeo's presence at the meeting. So we still need to go through all three elements.

I can point to preponderance of evidence and decisions after *New York times* to show you how that operates in reality and how courts march through those three. There was that *New York Times* opinion that mused upon the rigidity or not of the matching element.

THE COURT: Muse is one way to put it. The other way to say it is the Second Circuit stated.

MS. TINIO: Sure. It questioned the level of rigidity of it.

THE COURT: In language that I would submit a District Court is obliged to heed. This is the Second Circuit speaking.

MS. TINIO: Absolutely. For example, your Honor, when *New York Times* was remanded to the District Court, Judge McMahon was the District Court who had those cases, the *Targeted Killings* cases, and she issued a number of following opinions and in basically every opinion she applied Wilson. She said, We have to still have the specific disclosure. We have to have matching. Although, she acknowledges the Second Circuit's comments and rulings on that. She said you still have to look at --

THE COURT: Sorry. Wilson ultimately derives not the case itself but the test from the D.C. Circuit.

MS. TINIO: Uh-huh.

THE COURT: Judge Garland's decision is more recent from the D.C. Circuit. Putting aside that the Second Circuit

might take the Wilson test in a different direction, do you believe that the Garland decision effectively either abrogates or adds informative meaning to the Wilson test?

MS. TINIO: No, your Honor. The way we know that is in the following D.C. Circuit opinion in the very same case, the *Drones* case, the 2016 D.C. Circuit that followed Judge Garland's opinion, they went through the three parts of the test exactly the same.

THE COURT: Sorry. But that is not the Glomar stage. That is the next stage; right?

MS. TINIO: That is a stage at which the ACLU has the burden of pointing for a specific matching official public disclosure that waives the CIA's ability to--

THE COURT: I am sorry. I thought the Glomar stage was resolved by the decision of Judge Garland and then what happens afterwards is effectively the agency prevails because in the end there is sound reason not to with any specificity even have to give a Vaughn Index that might by its nature tend to reveal. Where I am going is that it sounds to me tracking the history in the D.C. Circuit that the concepts that you are articulating may yet well carry the day in this litigation for the agency. It is just not at the Glomar stage.

MS. TINIO: Your Honor, this is all part of the Glomar stage. So there are two parts to the Glomar stage. The first is where the agency establishes that to disclose the existence

or nonexistence of records that itself is a protected fact and that has to be tethered to particular FOIA exceptions. That tethering has to be logical and plausible. So our submissions have done that, said it is logical and plausible that to disclose whether or not the CIA has records or not would, A, tend to reveal a classified fact, which would be the involvement the CIA in this particular military operation or an intelligence interest of the CIA.

The second part the Glomar, it is actually still part of Glomar. Their burden now is to trying to overcome a Glomar response by saying, Oh, no, you have waived it because there is a specific matching public disclosure.

THE COURT: Let us suppose that I, in contrast to the argument you are making, find a disclosed interest by the agency as reflected in the Spicer statement. What from your perspective is the next step in this litigation?

MS. TINIO: Well, I think we would -- I think it would depend a bit on which part of it the Court had a problem with. For example, if the Court had looked at the agency's declaration and said, Well, you know, I kind of think that even though your declaration says that Director Pompeo was present in the meeting, that has nothing with the CIA's role or intelligence interests, I am not sure you established that but I think we would ask to provide a supplemental declaration further establishing it if your Honor --

THE COURT: What more do you need? We litigated this. You each have made substantial submissions. This was your chance. If what you are saying is you would like a Mulligan, I am not following. In other words, you've made your submissions. The Spicer statement and the materials that the ACLU has mustered are what they are. Let us suppose that I find having reviewed the rather voluminous submissions that have been made, I am not buying what you are selling and that the agency has disclosed at a highly general level to be sure its intelligence interests in this raid, what happens next? I am not saying you get a do-over. I am not asking you to agree with me; but if you assume I find against you that the Spicer statement and the companying data reflected disclosed agency interest, where do we go next?

MS. TINIO: The agency would then have to undertake a search, your Honor.

THE COURT: Right. If the agency undertook a search -- I am not asking you whether you have and I am assuming you have not because I don't want this dialogue inadvertently to give up something that you are obliged to protect, so we're talking entirely at a hypothetical level. If you were to undertake a search and you were to find material responsive to some or all of the five document calls but you were to conclude that they were all covered by Exemptions One or Three or since they seem to logically track together both,

what form would your ensuing response take that would not in turn disclose, for example, which of the five distinct requests by the ACLU the materials were responsive to?

I understand you to be saying in effect we are not obliged to give a Vaughn Index that reveals that we have legal submissions or casualty submissions or things of that ilk that may be more specific than we have ever admitted. In effect, I think you're saying that our response needs to be proportionate to the amount of the earlier disclosure, which was by anyone's measured a very general level and therefore following on what Judge Garland writes, There is flexibility in the Vaughn Index if you would utilize that. I think I am hearing you say that and my question is concretely what would that look like?

Suppose you found material responsive to all five -- this is purely a hypothetical -- your judgment was it would reveal information about our role that hasn't been revealed to specify which document request materials were responsive. How would you formulate your Vaughn Index so to invoke the exemptions but not reveal more than has been publically revealed?

MS. TINIO: I think, your Honor, there are a couple of parts to my response. One is without having done the search and knowing what may or may not exist, we cannot say in good faith -- represent in good faith what our response would be. It has to be appropriately tailored.

THE COURT: Of course. Look, I am asking you to indulge the hypothetical, that you were to find all that and it is easier to have this conversation with you now when everyone is in front of the veil and nobody has looked behind and we don't know what, if any, documents are there. I am asking assuming you found all five, what are some of the options available to you that would permit you to invoke both exemptions as to all documents without disclosing on a document-call-by-document-call basis what those documents relate to?

MS. TINIO: Well, I think I would like to come back to something at the end, but I think there are some types of responses that an agency can make that we actually discuss in our opening brief. Again, we cannot say that any of them would necessarily be appropriate here.

THE COURT: I know.

MS. DIAKUN: If the CIA found no documents, there would be no document response. It is possible in some circumstances that a no-number-no-list response may be appropriate; but we do not know such that such a response would be appropriate here. Most Vaughns don't necessarily actually break out documents by requests. So it wouldn't necessarily have to do that even if we provided a typical Vaughn; but a typical Vaughn in itself reveals quite a lot of information, which is the type of document, who is it from, what is it going

to go to, the date, and things like that.

THE COURT: In your experience what are the most abstracted types of Vaughn Indexes when they are put at the most generic general level; what do they look like?

MS. TINIO: Sometimes it can be categorical Vaughns with exceptions. Although, I don't know that that would be appropriate here. There is a variety, your Honor. A no-number-no-list response, for example, is literally not a list. It says, We acknowledge there are responsive documents, but we're not going to tell you how many and we're not going to list them out as what we do in a typical Vaughn. We don't know if that would be appropriate.

THE COURT: What are some of the other options available to the agency that allow it to mark the record that the following two, say, exemptions apply but does not needlessly reveal detail that has gone undisclosed given the very generic statement of the Spicer statement?

MS. TINIO: I think I have pretty much gone through the main options, but I would like to return to something your Honor was saying.

THE COURT: Yes.

MS. TINIO: I think in your Honor in your questions to Mr. Kaufman correctly pointed out that then Press Secretary Spicer's statements are general. I believe you characterized them as abstract and high-level and do not disclose the

existence or nonexistence of records responsive to each particular request. You actually started the exercise of talking Mr. Kaufman through the request. For the official acknowledgment test, your Honor, the gulf between the abstract, high-level nature of Press Secretary Spicer's statement and the specificity of the requested records, there is no waiver ability to assert Glomar. That is essentially an on-off switch.

Now, there are cases where courts have said, Okay, well, we found a little bit of a correspondence and so we're going to say that you waived your ability to assert Glomar as to some categories but not others. That is not a case where the statement or the acknowledgment is just very broad and each statement is very -- each request is very specific. That is more of a case where the court says, Hey, in this statement you specifically knowledge that there is legal analysis.

THE COURT: Let me ask you this: Suppose that is right, but isn't one of the options available to this Court to say, We'll look at the ACLU's five items and Items One, Three Four and Five are undisclosed by the Spicer statement; but Item Two, which begins with the opening clause, The process by which the government approved the Al-Ghayil raid, that at least is disclosed by the Spicer statement so in theory could not the Court say, I sustain the government's Glomar response as to Documents One, Three, Four and Five because none of those are

spoken to by Sean Spicer but because, number two, the process of approval is literally the subject of the relevant portion of the Spicer statement and as to that I don't sustain your Glomar and so we now move forward with respect to Item Two; is that an available option to the Court?

MS. TINIO: In theory it is possible to do things like that, but in this particular case that would not be consummate with the facts in the record.

THE COURT: No, no. I sorry. I know you don't agree with what I have posited about what the Spicer statement connotes; but if I believe that the Spicer statement is describing who is at the table in the approval process, would that not be at least be a doctrinally available option for the Court, which is to prune the request by saying, Your Glomar is fair game as to One, Three Four and five but there has been enough of a disclosure to keep Two alive?

MS. TINIO: Well, for example, in other cases such as *targeted killings* or *Electronic Surveillance Programs*, courts say, You have acknowledged that this program exists, or in the *Targeted Killings* case, You have acknowledged that the CIA had some operational role and that has been acknowledged. However, the CIA has still been able to maintain its Glomar over more specific topics, for example, whether or not the CIA --

THE COURT: I think you are saying "yes"?

MS. TINIO: Yes. But in this case, I would also point

out the fact in good faith, because I think your Honor sees some relevance between Director Pompeo having had been at the meeting as Press Secretary Spicer said and perhaps an approval process. So in this case the CIA in good faith undertook the search that your Honor asked Mr. Kaufman about because as is set forth in the CIA's declaration, Director Pompeo's simple presence at a meeting is itself not necessarily --

THE COURT: I am sorry. I was puzzled by that. It seems unusual to me in the context of Glomar for you to volunteer about a document search that you undertook as to some parts of this CIA as to one issue. Supposing your search had revealed documents, I take it you would have disclosed that, too?

MS. TINIO: Well, I think if the CIA had discovered documents reflecting nothing more than Director Pompeo was in a meeting, I think we would have provided a response as to that aspect, but the CIA did that search in good faith. That also demonstrates that Director Pompeo's simple presence at a meeting as a general advisor to the President, does not itself reveal a classified fact. However, if CIA itself had documents responsive to the five particular requests, which are very technical and very detailed, that in itself would tend to reveal a classified act as established in our declaration.

THE COURT: Is Mr. Kaufman right that were this proceeding to plenary document review, the plenary search in

response to a FOIA request, your search as to evidence relating to that meeting, as to documents relating to the meeting would have necessarily looked at a broader part of the CIA like the General Counsel's Office?

MS. TINIO: No.

THE COURT: Was there a search done of the General Counsel's Office?

MS. TINIO: Well, as the Shiner declaration establishes and which is consistent with the law, your Honor, the CIA looked at all locations in which it is reasonable likely --

THE COURT: That is conclusory. Was the General Counsel's Office searched?

MS. TINIO: I am not completely sure aside from what is --

THE COURT: Can you represent what parts of the CIA were searched?

MS. TINIO: Well, the declaration says a search in the office of the director because it is the office of the director set forth in a declaration, which would have records about the director's attendance at different meetings and any related background material relevant to a particular meeting.

THE COURT: May I ask you this: Who did the search?

MS. TINIO: The CIA.

THE COURT: No, I know that. Was it outside counsel

for the CIA? Was it the General Counsel's Office? Was it a lawyer at the CIA who did the search?

MS. TINIO: I am not completely sure that the CIA as most agencies do have particular people who are responsible for FOIA requests.

THE COURT: Do we know that whoever did the search at the CIA was sufficient neutral that their representations are merit weight?

MS. TINIO: Well, this is set forth in a sworn declaration by the CIA's declarant, which is unrebutted --

THE COURT: Of course it is unrebutted. If he want me to initiate discovery so they can rebut it, we can do that. Of course, it is unrebutted. Unless the ACLU has a mole, it is going to be unrebutted.

MS. TINIO: The CIA's declaration is afforded a presumption of good faith. The declarant is the information review officer for the litigation information review office. So as part of her role, she does clarification reviews. For example, she does clarification of CIA documented information that may be the subject of FOIA. This is certainly this person's job.

THE COURT: Let me try it differently. Let's suppose that the outcome of this proceeding were a split decision in which only Document Call Two survive the Glomar request and the Glomar submission, if that is the right word, and Two was in

turn narrowed to the meeting at the White House as opposed to later stages or earlier stages in the approval process on the theory that those were not in haec verba disclosed or circumstantially suggested, if so has the CIA already done then the entirety of the search that it would undertake if we got to the stage at which a document search in response to Document Call Two as I have narrowed it would be done?

MS. TINIO: Yes, your Honor. As the declaration establishes, to look at the broader meaning of Document Request Two, would -- it would have to respond to that otherwise -- tend to reveal a classified and protected fact.

THE COURT: I guess the question would be: Pompeo's presence at one meeting does not itself speak, I guess the argument would be, to whether the CIA had a hand earlier or later than that and therefore one way to think about this might be to say, Just because the ACLU submitted a FOIA request to find in a particular way, doesn't mean that the Court's ruling on the Glomar response needs to be all or nothing but it can potentially be tailored to the scope of the disclosure embodied in the Spicer statements and therefore render a split decision; that is available?

MS. TINIO: I think it is technically possible, yes.

THE COURT: Mr. Kaufman, brief rebuttal.

MR. KAUFMAN: I will start there, your Honor.

THE COURT: Let me try with you there on that. Just

because you have had five different document calls, and I understand that these are all areas of interest, there is a range of things that the government can say to open doors or to disclose. Let's look at Number Five. Number Five says, The number and identity of individuals killed or injured in the Al-Ghayil raid. Pause there. How is it that the CIA or Spicer on its behalf has disclosed an interest in that? There is a generic statement by Spicer that intelligence has been received, but it is untethered to the CIA that Spicer ever made.

MR. KAUFMAN: Addressing this entire line of questioning your Honor has been pursuing with the government, it is the government's burden to defend its response and in its declaration, it has not addressed whether for example responding to Prong Number Five --

THE COURT: I am sorry. Wait. From a Glomar perspective your first hurdle is the disclosure. You need to establish some government disclosure. Just because the government has made a disclosure that is in some part of this broad space doesn't mean that disclosure runs to the four corners or to the entire ambit of the space that is the Yemen raid.

MR. KAUFMAN: That is correct, your Honor. I want to be clear that the government has not defended its response on the basis of a prong-by-prong defense. It needs to do that

under the law. Now, you are right that to rebut a logical and plausible --

THE COURT: Are you saying that disables me from examining in between your two positions what has been fairly disclosed and what has not been?

MR. KAUFMAN: I am --

THE COURT: Because both of you have taken polar positions, does that mean I have to choose one or the other?

MR. KAUFMAN: I think that the Court would certainly benefit from additional briefing on whether, for example, revealing that the CIA had a record responsive to Number Five would merit a Glomar response. Your Honor, our duty here is to respond to the government. The government bears the burden and if the government had offered specific arguments about why, for example, merely having a before-the-fact or after-the-fact assessment of civilian casualties would reveal something more than its intelligence interests --

THE COURT: Let me ask you this: Suppose the Spicer statement -- just to give you a hypothetical -- had said, CIA Director Pompeo attended an approval meeting on January 25th but thereafter the CIA in no way, shape or form had anything to do with the raid or its fruits, if that were the statement and each of you took exactly the positions you are taking, could I not then say, Just because counsel choose to take wing positions, the Court is entitled to take a look at the scope of

the disclosure and apply it to the broad requests here? Why wouldn't I under those circumstances just because counsel have taken those positions can't I split the baby?

MR. KAUFMAN: I think you might have, but again I don't think we would have been here if that were the acknowledgment. This goes to a point I wanted to make in response if some of the government's arguments. The value to the efficiency of the litigation here in not allowing the government to impose unreasonable and illogical Glomar responses is huge. These cases can lead to years of frustration in litigation and this is not about the ACLU's ultimate request for records or whether in fact a record will be made public. This is about the law that allows a requester like the ACLU to ask the CIA for documents and when the CIA comes back be says, Here is why we cannot give you what you are asking for, we will make a reasonable judgment about whether we should pursue that case. I think if the acknowledge had been the one that you gave, we would not have spent the last four months litigating this issue.

THE COURT: If the CIA had said, We assert a Glomar response to everything but the opening clause, say, of paragraph two, what would your response have been?

MR. KAUFMAN: Sorry. They acknowledge --

THE COURT: Supposing the CIA had invoked Glomar as to everything other than the opening clause of your second

document call and as to that stood down and said, Yep, Sean Spicer gave it up, Director Pompeo was in the room, and therefore we can't responsively assert Glomar as to the one particular sought by the ACL, what would your position have been?

MR. KAUFMAN: Again, it is hard to know without responding to what the government's justification would have been, which is its duty. Let's just stick to the first category, your Honor, legal and policy analysis about the legal basis for the raid. Now, I don't know if we would have come to court to make this argument in order to defeat the government's Glomar on prong one; but we could have said, for example, that given that the CIA has an intelligence interest in this raid that has been acknowledged, the very fact that they possessed a record responsive to Number One does not tell you anything more than that. Maybe the government would have additional reasons for why that information was protected or what it would reveal, but it is not our job to say why that information shouldn't be protected. It is the government's job to say why it would be protected.

I really do want to emphasize that this practice is not new. The agency regularly uses Glomar responses that shift the timeline for litigation from what could be zero to many, many years in defense of an indefensible response.

Now, the next point I would like to make is that the

CIA does have to search, and we gave an example of a potentially responsive record to one or two of the prongs. There may be more. It is the government's duty again to demonstrate that a source or method or something else protected would glow from merely acknowledging that piece of information.

THE COURT: Is there any concrete evidence that you have been able to cite other than Spicer that situates the CIA specifically as having interest in the raid?

MR. KAUFMAN: Beyond the panoply of facts that we offer that I think under *Flores* very clearly can enter in and must enter into the Court's judgment about whether the government's explanation is logical and plausible, no, we have not. Again, if we're given the opportunity to respond in the next stage of the litigation to the CIA's specific arguments about whether it takes it prong by prong or document type by document type or exemption by exemption, we would be entitled to put forward new facts that we think undermine the credibility of those justifications.

THE COURT: Let me ask the government a question.

Government, suppose the Court was considering splitting the baby here and permitting Glomar as to some, but not all, you're affidavit speaks globally as Mr. Kaufman points out. What is the relevance of fact in your view that your affidavit paints with a singular brush as to all five of the document calls?

MS. TINIO: Your Honor, I think that our declaration makes very clear that the declarant looked at each of the five requests. The declarant specifically and implicitly says that. For example, in paragraph 18 the declarant says, As each of the five category of records requested by plaintiffs relate to the Al-Ghayil raid -- dot, dot, dot -- the agency that did not have some role in the operation or outcome would not possess the documents that fit the five categories outlined by the plaintiff. So the declarant makes clear that she looked at every single category, which is all the law requires. We're not required to have paragraph A and paragraph B and paragraph C. She makes clear she looked at all five of them and that if agencies did not have a role, they would not have the requested documents.

THE COURT: No, but you are saying that the way the declaration is written is sufficient to speak to each of the five parts?

MS. TINIO: Yes, your Honor, and it does specifically do that.

THE COURT: Thank you. We stand adjourned. I will take the decision under advisement.

I should have said this at the beginning, but I will say it now and I say this for the benefit of counsel but for everyone else who is here: This is a hard case and it involves complicated facts and complicated questions of law. I have

been the beneficiary of superb briefing on both sides and an excellent argument today under heavy fire for both of you. I don't want it to get lost that I am the beneficiary of terrific lawyering, which both makes my job harder but also more enjoyable.

I want to thank all of you here and wish everyone a healthy and happily holiday.

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